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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 115

GENERAL MOTORS CORPORATION,
Appellant,
v.
STATE OF WASHINGTON, ET AL.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OPPOSING MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 1071

GENERAL MOTORS CORPORATION,
Appellant,
v.
STATE OF WASHINGTON, ET AL.,
Appellees

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OPPOSING MOTION TO DISMISS

Appellant, pursuant to Rule 16(3) of the Rules of the Supreme Court of the United States, respectfully submits the following brief opposing the Appellees' Motion to Dismiss.

Very little need be said in opposition to the Appellees' Motion to Dismiss for the reason that their arguments were fully anticipated in the Jurisdictional Statement.

Facts: The counterstatement of facts, especially Motion 8-11, does not serve, as asserted (p. 7) to "identify the business activities engaged in within the State of Washington by General Motors". On the contrary, it lumps together (1) activities within the State of General Motors related to the taxed transactions, which alone are pertin-

ent, with (2) activities of General Motors without the State, (3) activities within the State of other Divisions and subsidiaries of General Motors, wholly unrelated to these transactions and separately taxed, and even (4) activities of General Motors' customers. General Motors' pertinent activities within the State are much better "identified" in the Statement of the Case in our Jurisdictional Statement, and particularly in the last paragraph on p. 7, the first paragraph on p. 8, and the first paragraph on p. 9; and again in the Argument at the top of p. 12.

Questions: As restated by Appellees, the Questions incorporate non-factual assumptions. For example, it is assumed on p. 15 that the district managers' functions include "responsibility to maintain the required dealer organization" and "securing orders". The appointment of dealers (who are independent of each other and not an "organization") is a function of the zone manager at Portland. Juris. St. 7. Orders are not ordinarily solicited at all and are received, accepted and filled outside the State. Juris. St. 8, 9. The trial court so found as a fact. Finding of Fact XX.

Argument—Introduction: Once again, most of the activities referred to on p. 17 are conducted in Oregon and other states, not Washington.

Norton Company v. Department of Revenue, 340 U.S. 534: We agree with Appellees' statement (p. 18) that this Court's decision in *Norton* is controlling. Juris. St. 11, 16, 18, 21, 22. We repeat that the State court's decision here is directly contrary to the holding in *Norton*. In that case, the taxpayer operated within Illinois a retail store. The Illinois court held all of Norton's transactions taxable because of the presence of that store. This Court reversed as to transactions which had no connection with the store except

the services of engineers working out of it, and declined to reverse as to transactions which utilized the store in some more substantial way because they were not satisfactorily "dissociated" from the admittedly taxable business of the store. The Court said (pp. 538-539):

> "This corporation has so mingled taxable business with that which it contends is not taxable that it requires administrative and judicial judgment to separate the two. We conclude that, in the light of all the evidence, the judgment attributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment."
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> "The only items that are so clearly interstate in character that the State could not reasonably attribute its proceeds to the local business are orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester. Income from those we think was not subject to this tax."

Thus, the only actual holding of *Norton* is that transactions which are not mixed up with a local business cannot be subjected to this type of tax. That is the holding which controls here.

West Publishing Co. v. McColgan, 328 U.S. 823: This case, cited on p. 18, was an apportioned net income tax case, and has no application here, as explained by this Court in *Northwestern States Portland Cement Co. v. Minnesota; Williams v. Stockham Valves & Fittings, Inc.,* 358 U.S. 450. Juris. St. 21.

Wisconsin v. J. C. Penney Co., 311 U.S. 435: General Motors' activities come precisely within the limits which the

quotation on p. 20 indicates would be a denial of due process. Juris. St. 17.

Undue Burden: Appellees do not even attempt to argue that General Motors' activities are not part of interstate commerce. It is surprising that they cite, on p. 23, *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, in support of their claim that the privilege of engaging in such activities can be taxed. *Spector* holds that it cannot, even by a properly apportioned tax. Juris. St. 11. None of the cases cited stands for that proposition. Juris. St. 3, 11, 14, 20, 21.

Multiple Burden: Another surprising citation is that of *Western Livestock v. Bureau of Revenue*, 303 U.S. 250, on p. 25. Western Livestock was fully taxable in New Mexico, although its customers were in other states, because its principal activities were in New Mexico; its contacts, other than customers, in other states were minimal, and it was not taxable in those other states. The fact situation was exactly the reverse of ours. If Washington can lay an unapportioned gross receipts tax on General Motors because of the incidents of its wholesale selling which take place in Washington, *a fortiori* Oregon and California can do so, where many more incidents of the same wholesaling occur—receipt, acceptance and filling of orders, shipment of goods, passage of title, billing and receipt of payment, appointment of dealers, analysis of dealers' statements, etc.

The Motion would like to obscure the substantial constitutional point raised in our First Question (Juris. St. 3-4, 11-13) as to whether a state may fragmentize an interstate transaction into "local incidents" and measure a tax on such incidents by the unapportioned gross proceeds of the whole business. This Court dealt with that same ques-

tion in *Nippert v. City of Richmond*, 327 U.S. 416, wherein it said (p. 423):

> "If the only thing necessary to sustain a state tax bearing upon interstate commerce were to discover some local incident which might be regarded as separate and distinct from 'the transportation or intercourse which is' the commerce itself and then to lay the tax on that incident, all interstate commerce could be subjected to state taxation and without regard to the substantial economic effects of the tax upon the commerce. For the situation is difficult to think of in which some incident of an interstate transaction taking place within a State could not be segregated by an act of mental gymnastics and made the fulcrum of the tax."
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> "This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax."

Justice Rutledge's view, quoted at pp. 27-28, is from his *dissent* in *McLeod v. J. E. Dilworth*, 322 U.S. 327, and related to a *sales* tax. We agree with the economic philosophy therein expressed, that consumer taxes should be paid to the state of the consumer. It has no application to franchise taxes, which should be paid to the state where the franchise is exercised and protected.

Discrimination: The discriminatory effect of the interplay of the dual taxes imposed on manufacturing and selling and the related exemptions cannot be brushed off as Appellees attempt at pp. 28-30. Juris. St. 13-15. This has

been emphasized by this Court in its most recent state tax decision, *Halliburton Oil Well Cementing Co. v. Reily*, No. 24 at this term of Court, decided May 13, 1963, in which just such a practical working out of a sales and use tax statute with certain exemptions, fair on its face, was found to discriminate unconstitutionally against interestate commerce.

Importance: Appellees' argument at pp. 30-32 that this case is not of sufficient importance and lacks sufficient novelty to merit review by this Court is fully answered in our Jurisdictional Statement, particularly pp. 19-23, and in the Motions for Leave To File and Briefs of the five *amici curiae*, each of which is a trade association representing many taxpayers.

Conclusion: This Brief and the Jurisdictional Statement are not, except incidentally, arguments on the merits. We believe, however, that, together with the five Motions and Briefs of *amici curiae*, they thoroughly establish that the case is of such constitutional substance and novelty and of such economic importance that it should be decided by this Court after full hearing on the merits.

Respectfully submitted,

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